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ABSTRACT

This paper examines the status of U.S. disability-related equal opportunity laws and identifies gaps in coverage, shortcomings and inconsistencies in interpretation and application, and deficiencies in enforcement. Problems with the scope of coverage result from: (1) laws that are not enforceable in federal courts against states, not co-extensive with laws prohibiting discrimination, and not co-extensive with the Federal Fair Housing Act (Title VIII of Civil Rights Act of 1968); and (2) the failure of the Federal Government to use its leverage as a consumer of goods and services. Problems with the language, interpretation, and enforcement of current handicap equal opportunity laws include the absence of reasonable accommodation requirements and standards, failure to spell out elements of nondiscrimination, lack of a clear distinction between nondiscrimination and affirmative action, etc. Also identified are problems in trying to apply traditional civil rights legal standards to discrimination on the basis of handicap, problems with the bill of rights for persons with disabilities, legal representation for persons with disabilities, and technical assistance needed for small businesses. Ten recommendations conclude the paper, urging the enactment of a comprehensive law requiring equal opportunity for individuals with disabilities, setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap. Twenty-one references are listed. (JDD)

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TOPIC PAPER A:

EQUAL OPPORTUNITY LAWS

National Council on the Handicapped

February, 1986

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I. INTRODUCTION

The right to freely and fairly pursue personal, social, and economic opportunities is paramount in any free society. Equal opportunity is a cornerstone of the legal, political, and economic systems of the United States -- the Land of Opportunity. Unfortunately, Americans with disabilities have often not been allowed access to the opportunities for which our society is justly famous.

Disability -- like birth, death, illness, accident, pain, happiness, and sadness -- is a normal part of human life. A majority of individuals who survive to adulthood will experience some form of significant temporary or permanent disability during their lifetimes. That a certain number of people will have disabilities is just as predictable and normal as that there will be tall people, short people, people with fair skin, black people, young people, and elderly people. Yet, because of their disabilities, millions of Americans find themselves denied opportunities that others take for granted and excluded unnecessarily from the productive mainstream of society.

President Reagan has recognized the importance of access to opportunities for persons with disabilities: "For only through opportunities to use the full range of their potential will our disabled citizens attain the independence and dignity that are their due." (President Reagan, 1983, p.124). In heralding the necessity of opening up opportunities for persons with disabilities, President Reagan echoes the statements of previous Presidents and numerous Congressional pronouncements.

The United States Supreme Court has acknowledged "the Federal interest in developing the opportunities for all individuals with handicaps to live full and independent lives" (Community Television of Southern California v. Gottfried, 459 U.S. 498, 508 (1983)).

Providing access to opportunities has generally been chosen over "taking care of" persons with disabilities as the preferred approach of the Federal and many state governments, along with international bodies and organizations of persons with disabilities, for at least the last two decades. Twenty years ago, an article written by a blind law professor and his colleague contrasted the "custodial" and "integrative" approaches to disability:

> The older custodial attitude is typically expressed in policies of segregation and shelter, of special treatment and separate institutions. The newer integrative approach focuses attention upon the needs of the disabled as those of normal and ordinary people caught at a physical and social disadvantage. The effect of custodialism is to magnify physical differences into qualitative distinctions; the effect of integrationism is to maximize similarity, normality, and equality as between the disabled and the able-bodied.
> (ten Broek and Matson, p. 816).

In their laws and official pronouncements, government bodies at all levels of modern American society have, with relative consistency, chosen equal opportunity, full participation, and integration as the desired objectives for people with disabilities (U.S. Commission on Civil Rights, 1983, pp. 67-69). Congress has declared:

> the benefits and fundamental rights of this society are often denied those individuals with mental and physical handicaps;
> ***
> it is of critical importance to this Nation that equality of

> opportunity, equal access to all aspects of society, and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps;
> ***
> it is essential ... that the complete integration of all individuals with handicaps into normal community living, working, and service patterns be held as the final objective
> ***
> (29 U.S.C. section 701 Note, (1976)).

A major obstacle to achieving the societal goals of equal opportunity and full participation of individuals with disabilities is the problem of discrimination. Discrimination consists of the unnecessary and unfair deprivation of an opportunity because of some characteristic of a person. It is the antithesis of equal opportunity.

The severity and pervasiveness of discrimination against people with disabilities is well-documented. The U.S. Commission on Civil Rights' major study of handicap discrimination concluded: "Historically, society has tended to isolate and segregate handicapped people. Despite some improvement, particularly during the last two decades, discrimination against handicapped persons continues to be a serious and pervasive social problem. It persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation." (U.S. Commission on Civil Rights, 1983, p. 159). Numerous commentators and court cases have documented various examples of discrimination against individuals because of their disabilities. A 1985 decision of the United States Supreme Court recognizes that serious discrimination against persons with disabilities results not only from intentional denials of opportunity, but also from thoughtlessness, indifference, and benign neglect

(Alexander v. Choate, 105 S.Ct. 712, 718 (1985)).

To address the problem of denials of opportunity to persons with disabilities, Congress has enacted several laws prohibiting discrimination on the basis of handicap. Equal opportunity laws for persons with disabilities have been a bipartisan priority. Former President Carter had declared that "antidiscrimination laws are the cornerstone of civil rights for the handicapped" (President Carter, 1980, p. 809). President Reagan has written:

> Our Nation's commitment to equal protection of the laws will have little meaning if we deny such protection to those who have not been blessed with the same physical or mental gifts we too often take for granted. I support Federal laws prohibiting discrimination against the handicapped, and remain determined that such laws be vigorously enforced. (President Reagan, 1982).

In its National Policy For Persons With Disabilities, endorsed by the President, the National Council on the Handicapped called for "a comprehensive, internally unified body of disability-related law which guarantees and enforces equal rights and provides opportunities for individuals with disabilities." Congress has enacted several laws prohibiting discrimination or requiring equal opportunity for persons with disabilities. One of the best-known of such laws is Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. Section 794), which prohibits discrimination on the basis of handicap in programs and activities conducted by the Federal government or conducted by recipients of Federal financial assistance. Section 503 of the Rehabilitation Act (29 U.S.C. Section 793) requires Federal government contractors to take "affirmative action" to employ and advance workers with disabilities. Section 501 (29

U.S.C. Section 791) places a similar "affirmative action" requirement upon Federal government employment. Several other Federal laws prohibit discrimination on the basis of handicap in certain other contexts.

This report examines the current status of disability-related equal opportunity laws and identifies gaps in coverage, shortcomings and inconsistencies in interpretation and application, and deficiencies in enforcement. To address such problems, the Council makes recommendations for the enactment of comprehensive and effective equal opportunity laws for people with disabilities.

II. PROBLEMS WITH THE SCOPE OF COVERAGE

A major problem with current equal opportunity laws regarding disabilities is that the scope of their coverage and enforceability is quite limited.

A. Not Enforceable In Federal Courts Against States

A recent decision of the United States Supreme Court has blunted much of the effect and enforceability of Section 504 of the Rehabilitation Act. In Atascadero State Hospital v. Scanlon (105 S.Ct. 3142 (1985)), the Court ruled that the Eleventh Amendment prohibits suits for monetary damages in Federal court against States and state agencies under Section 504. While the dissenting Justices argued that Section 504's legislative history demonstrated that Congress clearly intended the States to be "among the primary targets of section 504" (Id. at p. 3151), the majority of the Court held that Congress can abrogate the States' immunity from Federal court suits "only by making its intention unmistakably clear in the language of the statute" (Id. at p. 3147). Because Section 504 does not contain such an unequivocal statement that the States may be sued in Federal court, the Court ruled that state agencies are immune from suits for monetary damages under Section 504. Considering the large proportion of Federal financial assistance to States and state agencies, such as state education agencies, state universities, and state residential programs for people with disabilities, the impact of the Court's decision upon the enforceability of Section 504 is considerable. Congressional intent appears to have been thwarted by this ruling, for it is hard to dispute the conclusion of the

dissenting Justices that "Congress intended to impose a legal obligation on the States not to discriminate against the handicapped" (Id. at p. 3153).

Consistent with Congressional authority under the Fourteenth Amendment, the statutory prohibition of discrimination on the basis of handicap should extend to all "State actions." This would apply to all officially sanctioned conduct of the States, state agencies, state officials, and county and local governments, acting "under color of state law." The application to local government bodies, including such entities as zoning boards, is consistent with the decision of the U.S. Supreme Court in City of Cleburne, Texas v. Cleburne Living Center (105 S.Ct. 3249 (1985)), which held that a local zoning board's denial of a special exception to permit a group home for mentally retarded people in a residential neighborhood was irrational and violated the Fourteenth Amendment. (For additional discussion of the zoning issue and of the need for a statutory provision addressing it, see the Council's report on Housing).

B. Not Co-Extensive With Laws Prohibiting Discrimination in Employment on the Basis of Race, Color, Religion, Sex, or National Origin

Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et seq.) prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. It applies to all employers engaged in an industry affecting commerce who have fifteen or more employees, to employment agencies, and to labor unions.

Laws addressing handicap discrimination do not have comparable coverage of employment. They cover primarily employment by Federal government agencies, Federal contractors, and recipients of Federal grants. The fact that a business engages in interstate commerce, which makes it subject to Congressional authority under the U.S. Constitution, does not, under current statutes, give rise to any duty to refrain from discriminating against people with disabilities. There do not appear any sound policy reasons why employers who are prohibited from other types of discrimination should be allowed to discriminate on the basis of handicap.

C. The Program or Activity Limitation

In the case of Grove City College v. Bell (104 S.Ct. 1211 (1984)), the U.S. Supreme Court ruled that an educational institution is covered by the nondiscrimination provisions of Title IX of the Education Amendments of 1972 (20 U.S.C. Section 1681(a)) if some of its students receive Federal grants to pay for their tuition. But the Court ruled that the receipt of such Federal grants does not trigger institutionwide coverage. Since this form of financial assistance, said the Court, represents financial assistance to the college's financial aid program, it is only that program which is regulated by Title IX. Because the pertinent provisions of Title IX are very similar to the language of Section 504, the holding in Grove City has implications for the interpretation and application of Section 504.

The same day that it decided the Grove City case, the

Supreme Court also announced its decision in Consolidated Rail Corporation v. Darrone (104 S.Ct. 1248 (1984)) -- a Section 504 case. The Court mentioned its discussions of the meaning of "program or activity" in the Grove City and North Haven Board of Education v. Bell (456 U.S. 512 (1983)) decisions under Title IX, and stated that: "Clearly, this language limits the ban on discrimination to the specific program that receives federal funds" (104 S.Ct. at p. 1255). The Court did not, however, attempt to define the term "program" in Darrone, but held that that task should be left to the district court. Given the procedural posture of the case, the high Court declined to decide whether Federal financial assistance was received by the "program or activity" that allegedly discriminated against the plaintiff in Darrone.

In response to the Grove City decision and its implications for Title IX, Section 504, and other similar statutes, legislation was introduced during the 98th Congress, but no such bill was enacted. Similar bills, referred to as the Civil Rights Restoration Act, have been introduced in the 99th Congress. Such bills are based upon a conviction that any person or agency that wishes to obtain Federal grant funds should be required to avoid or cease discriminating in all of its activities. Conversely stated, the Federal government should not provide financial assistance to any person or agency that engages in discrimination in any part of its operations or activities.

D. Not Co-Extensive With Federal Fair Housing Act

Title VIII of the Civil Rights Act of 1968 (42 U.S.C. sections 3601 - 3619) prohibits discrimination in housing on the basis of race, color, religion, sex, and national origin. The coverage of Title VIII is extremely broad, applying to almost all types of housing with the exception of certain private, single family dwellings, and facilities owned or operated by religious groups and private clubs.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap only in housing programs or activities of the Federal government or that receive Federal financial assistance. Compared to the coverage of Title VIII, the housing subject to Section 504 is quite limited. Various bills have been proposed that would provide equivalent coverage of handicap discrimination as that provided under Title VIII, generally by simply adding "handicap" to the types of discrimination prohibited in Title VIII. A key element that should be addressed in such proposals is a standard regarding the duty upon landlords, developers, and sellers to make reasonable accommodations for tenants and purchasers with disabilities.

E. Not Co-Extensive With Prohibitions of Other Types of Discrimination in Public Accommodations

Title II of the Civil Rights Act of 1964 (42 U.S.C. Section 2000a) prohibits discrimination on the basis of race, color, religion, or national origin in public accommodations. It applies to a broad range of "places of public accommodation," including inns, hotels, motels, restaurants, cafeterias,

lunchrooms, lunch counters, soda fountains, gas stations, motion picture houses, theaters, concert halls, sports arenas, and stadiums, if such facilities "affect commerce" or if the discrimination or segregation is "supported by State action."

There is no comparable provision prohibiting discrimination on the basis of handicap in public accommodations. Except for the relatively rare case in which a place of public accommodation is the recipient of Federal grant funds, no Federal law addresses unnecessary barriers and other forms of discrimination that deprive persons with disabilities of the use of public accommodations. Thus, many hotels, motels, restaurants, theaters, stadiums, and other public accommodations that are prohibited from discriminating against racial, ethnic, and religious groups may with impunity refuse to serve and deny access to their facilities to people because they have disabilities.

F. Failure of the Federal Government to Use Its Leverage as a Consumer of Goods and Sevices

Federal agencies spend large sums of money on contracts and purchases of consumer goods and services. Government agencies rent large numbers of conference and meeting rooms, and pay for many hotel rooms of meeting attendees and government employees on travel. The government purchases a great quantity of airline and train tickets, frequently through arrangements with "contract" carriers. Government agencies also pay for great numbers of rental cars used by government employees, often through agency contracts with particular companies.

Many of the companies from whom the government rents or purchases facilities, goods, and services have not made substantial efforts to make their products and services equally open and usable by government employees and other consumers who have disabilities. Many conference and meeting facilities rented by government agencies are architecturally inaccessible or do not have adequate toilet facilities for persons with disabilities. The government pays the costs for many hotel and motel rooms in establishments that are not accessible and have made no efforts to plan for and accommodate disabled guests. Some of the airlines and train companies that benefit from government travelers have poor records of accommodating individuals with disabilities; many have inaccessible stations and vehicles, and archaic rules and practices that exclude or demean travelers who have disabilities. Rental car companies that reap the benefits of government business often do not provide vehicles with hand controls or other modifications needed by individuals with disabilities, or provide modified vehicles only in certain cities, or upon very different terms from that offered to other people, e.g., at higher rates or requiring that a modified vehicle can be returned only at the original place of rental.

Some organizations of persons with disabilities have made use of their "consumer clout" to get providers of services and goods to be more accommodating to those with disabilities. In selecting a site for national conferences or conventions, for example, some organizations bargain with the management of hotels to make more rooms, restrooms, and other facilities accessible. The Federal government, in contrast, has made no use of its

considerable leverage as a consumer of goods and services to improve the lot of government employees and other individuals having disabilities. Rooms are paid for, tickets purchased, and cars leased without any attempt to get the businesses involved to make their facilities and services more open and usable by people with disabilities. The Federal government is squandering an important opportunity to provide leadership and incentive to make the oft-recited goals of equal opportunities, integration, and full participation of disabled people more of a reality in this country. Federal agencies need to send a clear message to hotels, motels, airlines, train companies, rental car companies, and other purveyors of consumer goods and services that they will not do business with those who refuse to provide equal opportunities for customers with disabilities.

G. Other Gaps in Coverage

There are certain other areas in which serious problems of discrimination against people with disabilities are within the scope of Congressional authority to address, but no legislative remedies have been provided under current laws. In the case of Community Television of So. Cal. v. Gottfried (459 U.S. 498 (1983)), the U.S. Supreme Court ruled that, because Section 504 of the Rehabilitation Act of 1973 is silent on the matter, the Federal Communications Commission is not required to ensure that its public television licensees do not discriminate on the basis of handicap. The application of the nondiscrimination requirement to Federal licensees is an issue that should be addressed by equal opportunity laws for people with disabilities,

but, to date, has not been.

Interstate travel is another area in which the problems of discrimination faced by persons with disabilities should be explicitly covered by equal opportunity laws. (For further discussion of such problems and recommended approaches for addressing them, see the Council's report on Transportation). Likewise, individuals with disabilities have encountered discrimination in the availability of insurance; frequently individuals are denied certain types of insurance coverage because of presumptions about their increased risks and deficits, even though there may be no adequate actuarial data supporting such presumptions (Baker and Karol, 1978). Problems of discrimination in eligibility for insurance should be addressed in equal opportunity laws for people with disabilities.

III. PROBLEMS WITH THE LANGUAGE, INTERPRETATION, AND ENFORCEMENT OF CURRENT HANDICAP EQUAL OPPORTUNITY LAWS

The nation has had a dozen years of experience under the nondiscrimination provisions of the Rehabilitation Act of 1973. A number of problems with the wording and enforcement of current laws guaranteeing equal opportunities for people with disabilities have come to light.

A. Absence of Reasonable Accommodation Requirement and Standards

A key element of eliminating discrimination on the basis of handicap is the process of matching the particular abilities and limitations of each disabled individual with the essential requirements of a particular activity and trying to modify the activity as necessary to permit the individual with a disability to participate. Legally, this matching and modification process has been imposed as the concept of reasonable accommodation. Reasonable accommodation occurs whenever a service provider or employer provides or modifies devices, services, or facilities, or changes practices or procedures in order to match a particular person with a particular program or activity.

The duty to make reasonable accommodations to the limitations of persons with physical and mental disabilities was first applied in 1976, when the Department of Labor issued regulations affecting government contractors under Section 503 of the Rehabilitation Act of 1973. Over ten years of experience with the reasonable accommodation requirement suggests that it is a workable and effective concept. Concerns about the costs and

disruptiveness of the duty to make reasonable accommodations have been found to be largely misplaced. Studies have found that workplace accommodations for indiviuals with disabilities frequently cost little or nothing (See authorities collected in U.S. Commission on Civil Rights, 1983, p. 2). The E. I. du Pont de Nemours and Company has reported: "The cost of most accommodations is nominal" (du Pont, 1981, pp. 17-18). And a U.S. Department of Labor study concluded that accommodation is "no big deal" (DOL, 1982, p. 2).

If the practical application of the reasonable accommodation requirement has not been particularly troublesome, its conceptual and legal theoretical development has been somewhat more problematic. None of the existing handicap nondiscrimination statutes explicitly mention a duty to make reasonable accommodations to permit the participation of handicapped people. The U.S. Supreme Court, in the case of Alexander v. Choate (105 S.Ct. 712 (1985)), recognized the existence of a duty to make reasonable accommodations under Section 504 of the Rehabilitation Act of 1973: "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." (Id. at p. 721). The Court noted that "the regulations implementing section 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." (Id. at p. 721 n. 21). Nonetheless, the Court's ruling, coupled with its earlier hazy analysis in Southeastern Community College v. Davis (442 U.S. 397, 411-413 (1979)), has not dispelled confusion about the nature and extent of a duty to accommodate. Lower courts,

regulatory agencies, and analysts have wrestled very inconsistently with questions about the existence and extent of the reasonable accommodation requirement. Section 504 has been variously interpreted as requiring modifications to existing programs as long as such changes are not "massive," as mandating only "modest affirmative steps" to accommodate persons with disabilities, as requiring only de minimis modifications (those not requiring any effort or expense), or as not requiring accommodation at all.

The absence of a stated requirement of reasonable accommodation and of delineated standards for its application is one of the most serious shortcomings of current handicap equal opportunity laws.

B. Failure to Spell Out Elements of Nondiscrimination

Laws such as Section 504 of the Rehabilitation Act of 1973 prohibit discrimination on the basis of handicap in general terms, but they do not further define or delineate the nature of the "discrimination" that is prohibited. This leaves open a number of key questions about the impact of the nondiscrimination requirement. Is it discrimination to fail to remove architectural, transportation, and communication barriers? How far does the duty to remove such barriers extend? Is it discrimination to use selection criteria and eligibility requirements that screen out or have a disproportionate effect upon people with disabilities? What tests or standards should be applied to determine the legality of such criteria or eligibility requirements? Are there limits upon the changes that

a person, business, or agency is required to make in its operations in order to avoid or stop discriminating? To what extent are costs and impact upon a program or activity a defense to the duty not to discriminate? These and other questions about the nature and extent of the handicap nondiscrimination requirement remain largely unanswered and debated, because of the failure of the statutes to resolve them by spelling out the types and elements of the discrimination that is prohibited.

Until the Supreme Court resolved the issue in the recent case of Alexander v. Choate (105 S.Ct. 712 (1985)), it was not even clear whether Section 504 prohibited discrimination that occurs unintentionally, or whether its nondiscrimination mandate was limited only to intentional actions. Looking at such unintentional discrimination as architectural barriers erected thoughtlessly, the Court declared: "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent" (Id. at p. 719). It is noteworthy, however, that litigation had to be pursued to the highest court in the land to answer the question whether Section 504 addresses unintentional acts of discrimination. Clarity and consistency in the interpretation and application of handicap nondiscrimination laws would be greatly furthered by a clear delineation in the statutes themselves of the types of discrimination they make unlawful.

C. Use of the Word "Solely" in Statutory Language

Section 504 of the Rehabilitation Act of 1973 states that no qualified handicapped individual shall be excluded, denied benefits, or subjected to discrimination "solely by reason of his handicap." The phrase "solely by reason of" does not appear in other types of nondiscrimination laws. Whatever may have prompted the choice of this language in drafting the statute, it may be interpreted to allow discrimination, exclusion, and denials of benefits on the basis of handicap where such discrimination is only one of the justifications for the action taken. The goal of such laws would most appropriately seem to be to eliminate from the decision-making process discrimination against persons with disabilities, not to eliminate such discrimination only when it is found in a pristine, isolated, unadulterated form. As in nondiscrimination laws protecting other groups, the phrase "solely by reason of" is unnecessary and should not be included in laws guaranteeing equal opportunities for people with disabilities.

D. Problems With Concept of "Otherwise Qualified"

By its terms, Section 504 applies to handicapped individuals who are "otherwise qualified." The phrase "otherwise qualified" is not found in other types of nondiscrimination laws, presumably because it is assumed that denials of opportunity because of failure to meet legitimate qualifications do not constitute discrimination condemned by these laws. From this point of view, the phrase "otherwise qualified" in Section 504 may be considered a redundancy. A person who is denied a benefit because he or she

does not possess the requisite qualifications has not been subjected to discrimination; such an individual has been excluded because of an absence of qualifications, not on the basis of handicap discrimination. On the other hand, if the qualifications established for a job or activity are themselves discriminatory, the concept of "otherwise qualified" in the statute only further complicates the analysis. In each case, the pertinent question under Section 504 would seem to be whether a person has been discriminated against on the basis of handicap. The close interrelationship between the concepts of "otherwise qualified" and discrimination under Section 504 has been noted by the Supreme Court. In Alexander v. Choate, the Court observed that "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the Section would seem to be two sides of a single coin..." (Id. at p. 720, n. 19).

The inclusion of "otherwise qualified" in the statutory language leads to results that seem clearly illogical. The outcome of a case in which a handicapped person is found not to possess the appropriate qualifications for a program or activity is a ruling that the person is not an "otherwise qualified handicapped individual," and is, therefore, not protected by Section 504 -- Section 504's prohibition of discrimination does not apply to that person and that individual cannot invoke the statute's protection. A more logical result would seem to be a ruling that a handicapped individual who does not have appropriate qualifications is covered by the nondiscrimination requirement, but has not, in fact, been discriminated against.

The implications of the "otherwise qualified" phraseology

were clearly illustrated in the Supreme Court's analysis in Southeastern Community College v. Davis (442 U.S. 397 (1979)). The case involved a woman with a serious hearing disability who had been excluded from a clinical registered nurse training program. The Court determined that there were no modifications that the college could make in its program that would enable Ms. Davis to successfully participate in the program. The logical conclusion, therefore, would have been that Ms. Davis had not been discriminated against. But because of the "otherwise qualified" wording in Section 504, the Court's conclusion instead was that Davis was not an "otherwise qualified handicapped individual," and Section 504 did not cover her. Such an analysis seems to blur a scope of coverage question with a substantive question of discrimination.

For persons with disabilities, the danger of the "otherwise qualified" concept is that by the way agencies state their qualifications for participation in a program or activity covered by Section 504 they can eliminate persons with various disabilities from eligibility, and can even make the disabled person ineligible for the statutory protection against discrimination. This danger is all the more real because, as noted above, the handicap nondiscrimination laws provide no statutory standards regarding the use of discriminatory eligibility requirements, selection criteria, and qualifications standards. Moreover, there has not been a consistent recognition of the interplay between qualifications and reasonable accommodation. Some otherwise unqualified persons may become

qualified if reasonable modifications of the program or activity are made. For example, the ability to walk up stairs may be a legitimate qualification for a job in a particular factory, but a person who uses a wheelchair may nonetheless become qualified if the company is required to make a specific work station accessible as part of its duty to make reasonable accommodations to persons with disabilities. The relationship between reasonable accommodation and qualifications and the delineation of what types of qualifications are nondiscriminatory and permissible are part of the overall task of defining and setting standards regarding discrimination. The inclusion of the "otherwise qualified" concept in the statute is unnecessary and problematic, and serves to obscure the real issues.

E. Problems With the Term "Handicapped Individual"

Section 504 protection is afforded to an otherwise qualified "handicapped individual." In delineating a class of persons that is eligible for the protection of the statute, Section 504 deviates from the model of other types of nondiscrimination statutes, which simply prohibit discrimination "on the basis of" race, or sex, or national origin, etc.; all persons are covered by the protection of these other statutes. Under Section 504, before you are protected from discrimination on the basis of handicap, you must first show that you are a "handicapped individual."

For persons with disabilities who have spent many years of their lives stressing their abilities rather than their limitations, and who have strenuously objected to being assigned

labels such as "handicapped," the need to prove that one is a "handicapped individual" can be very undesirable. Moreover, the showing that one is "handicapped" often tends to depend upon a medical model of disability -- the necessary proof is often a doctor's certification that the individual has a mental or physical handicap according to medical standards. For many persons with disabilities, this medical approach to disabilities is objectionable.

Some potential problems with the concept of "handicapped individual" have been avoided by the broad definition provided in the statute. For the purposes of Title V of the Rehabilitation Act (which includes Sections 501, 502, 503, 504, and 505), "handicapped individual" is defined as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." (29 U.S.C. Section 706). The regulations implementing Section 504 fill in some of the details of this general definition by listing categories of conditions included. An Appendix accompanying the regulations when they were originally published provides even more specificity by giving a partial list of the particular conditions denominated "handicaps" under the definition (42 Federal Register 22685-86 (May 4, 1977)).

The statutory formulation, the regulations, and the analytic Appendix together provide a definitional approach that is expansive and flexible, and yet also fairly specific. The inclusion of the "has a record of" and "is regarded as having"

components of the statutory definition could go a long way toward making the definition sufficiently broad and flexible and avoiding a medical cerification approach. Nonetheless, in practical application in administrative proceedings and court cases, persons with disabilities most often find themselves having to prove that they meet criteria (A) of the statutory formulation, i.e., that they have a physical or mental impairment that substantially limits one or more major life activities. Such a requirement does not sit well with those disabled individuals whose orientation is toward achievement and independence.

The statute's denomination of a protected class of "handicapped individuals" also causes problems about where lines should appropriately be drawn for the statute's coverage. Conditions that do not inherently interfere with major life activities may become serious "handicaps" because of employers' and agencies' reactions to them. Individuals have been denied employment and excluded from participation in programs and activities because of such conditions as glaucoma in an arrested state, cancer of the uterus that has been successfully treated, minor degrees of back impairment, a missing kidney, absence of part of a finger, or double vision. Many of these conditions do not of themselves entail a substantial limitation upon major life activities, so a person with such a condition has a hard time meeting the statutory definition for Section 504 protection. Yet they may have been excluded precisely because of discrimination against them on account of their disabilities.

Very often, the "handicapped individual" limitation to Section 504 coverage places a person who has been discriminated against on the basis of handicap in a "Catch 22" situation. To be a "handicapped individual" eligible for Section 504 protection, a person has to show that he or she has a substantial impairment of ability that limits major life activities, but to be "qualified," a person has to show that he or she is not substantially impaired in ability.

Proof of class membership is not required under other types of nondiscrimination laws, and statutes guaranteeing equal opportunity for persons with disabilities need not have such a requirement either. Such laws should focus upon a demonstration of discrimination "on the basis of handicap" rather than requiring proof of membership in a protected class.

F. Lack of a Clear Distinction Between Nondiscrimination and Affirmative Action

Sections 501 and 503 of the Rehabilitation Act of 1973 require Federal agencies and Federal contractors, respectively, to have an "affirmative action" program for the employment and advancement of individuals with disabilities. Section 504 prohibits discrimination on the basis of handicap. As noted previously, the concept of discrimination is not defined in the Act. Likewise, the meaning of the term "affirmative action" is not described or defined. Consequently, there has been some confusion concerning the nature and extent of each of these requirements, and where to draw a line between them.

Such confusion resulting from lack of statutory clarity was

evident in the opinion of the United States Supreme Court in Southeastern Community College v. Davis, (442 U.S. 397, 410-413 (1979)). The Court tried to draw a distinction between "evenhanded treatment of qualified handicapped persons" and "affirmative efforts to overcome the disabilities caused by handicaps." The former, according to the Court, is nondiscrimination; the latter, affirmative action. And Section 504, unlike Sections 501 and 503, mandates only nondiscrimination, not affirmative action. Such analysis, however, runs into trouble with concepts such as reasonable accommodation and architectural barrier removal. Are these nondiscrimination or affirmative action? In the Davis opinion, the Court first discusses accommodation as an affirmative action requirement and then, two pages later, describes accommodation as a nondiscrimination requirement (442 U.S. 411-13).

The Court subsequently acknowledged the analytic haziness of its opinion in Davis. In Alexander v. Choate, the Court observed:

> Our use of the term affirmative action in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation; the former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped.
> (Id. at p. 721, n. 20)

The statutory lack of definity about the meaning of nondiscrimination and affirmative action has led to inconsistent interpretations of the extent of the duty not to discriminate under Section 504, on the one hand, and to a lack of clarity about requirements to engage in recruitment and outreach efforts

under Sections 501 and 503, on the other. To establish clear and enforceable standards, equal opportunity laws for people with disabilities should define the elements of nondiscrimination, as discussed above, and should explicitly require recruitment and outreach activities to increase the participation of people with disabilities in programs and activities covered by these laws.

G. Problems With the Enforceability of Section 503

The requirement imposed by Section 503 of the Rehabilitation Act of 1973 that Federal contractors take affirmative action to employ and advance qualified handicapped individuals is enforceable by the filing of a complaint with the Department of Labor (DOL). Administrative enforcement proceedings within DOL have sometimes been criticized as involving lengthy delays and reluctance upon the part of the Department to rule against contractors.

Section 503 does not mention any right of aggrieved handicapped persons to file a private court suit against a contractor who has violated the statute. Some courts have ruled that such a private right of action is implicitly created by Section 503, but the greater weight of judicial precedent is against the existence of such a right.

In accordance with other types of nondiscrimination laws, it seems appropriate that if a disabled complainant has filed a complaint with the Department of Labor and has not obtained any administrative resolution within a reasonable period of time, the complainant should have the option of filing a Federal court lawsuit to vindicate his or her rights under the law. The right

to such a private cause of action should be explicitly provided in the statute.

H. Limited Applicability of Barrier Removal Requirements and Problems Regarding the Architectural and Transportation Barriers Compliance Board

Section 502 of the Rehabilitation Act of 1973 established the Architectural and Transportation Barriers Compliance Board (ATBCB) and charged it with a variety of responsibilities in regard to the enforcement of the Architectural Barriers Act (42 U.S.C. Sections 4151-4157), and the elimination of architectural, transportation, and communication barriers confronting individuals with disabilities.

The Architectural Barriers Act of 1968 was the first Federal legislation requiring certain Federally constructed, altered, leased, or financed buildings to be readily accessible to persons with physical disabilities. It designated four agencies -- the General Services Administration, the Department of Defense, the Department of Housing and Urban Development, and the U.S. Postal Service -- to develop standards for the design, construction, and alteration of buildings covered by the Act.

A 1978 amendment to Section 502 of the Rehabilitation Act added to the ATBCB's functions the responsibility to issue minimum guidelines and requirements for the standards established by the four standard-setting agencies. A final rule issued by ATBCB establishing such Minimum Guidelines was published in the Federal Register on August 4, 1982 (42 Federal Register 33862, codified at 36 C.F.R. Part 1190). Subsequently, the four

standard-setting agencies concurred in the joint issuance of Uniform Federal Accessibility Standards, which were published on August 2, 1984.

A significant problem with Federal requirements regarding architectural, transportation, and communication barriers removal is simply that most buildings and transportation systems are not subject to such requirements. The buildings subject to regulation under Federal accessibility standards are primarily only those that are built by, leased by, altered by, or financed by the Federal government. While this obviously includes a large number of buildings, a much larger number of buildings continue to be built without being subject to any accessibility requirements. Moreover, even for those buildings that are subject to Federal barriers laws, the limited resources of ATBCB and the limited enforcement efforts of the four standard-setting agencies result in sporadic implementation of accessibility requirements. Likewise, existing state and local laws regarding architectural barriers are seldom enforced.

Many commentators and architects have begun to advocate a concept of "universal accessibility." They argue that mandates of accessible building design would be beneficial to most Americans. As one architect has written:

> (A)ll people pass through stages of ability and disability: children who have not yet attained adult strength, stature or mental processes; pregnant women who, even without complications, suffer reduced stamina, mobility, agility and balance; persons who tend the very young and are encumbered by carrying infants, maneuvering baby vehicles or moving hand-in-hand with a toddler whose mobility is tenuous at best; aging persons who are subject to progressive loss of physical, perceptual and mental faculties. In addition, there are the many people who at a given time may experience temporary disabilities as a result of illness or accidental

> mishap. The designed environment at present satisfactorily accommodates only a small number of people who are in their prime period of the life cycle and who also possess maximum physical and mental capabilities. All the rest of us who are in the majority could benefit greatly from barrier-free design.
> (Morgan, pp. 50-51)

The benefits of universal accessibility, when combined with data that indicate the costs of achieving barrier-free design in new construction is less than 1 percent, make for a strong argument in favor of broad accessibility requirements. The Federal government should make use of its authority to enforce the Fourteenth Amendment, to regulate interstate commerce, and to regulate recipients of Federal financial assistance, to establish broad and strong standards for the elimination of architectural, transportation, and communication barriers.

A more specific problem with the coverage of Federal accessibility requirements concerns the authority of the ATBCB in regard to transportation barriers. A 1978 amendment to Section 502 gave ATBCB the responsibility to "insure that public conveyances, including rolling stock, are readily accessible to, and usable by, physically handicapped persons." The statute does not, however, expressly provide that ATBCB has authority to establish minimum guidelines for transportation facilities and vehicles analagous to its authority to write minimum guidelines for buildings subject to the Architectural Barriers Act. As a result, the ATBCB's authority in the area of public conveyances is somewhat unclear, and the Board has not assumed a very strong role in setting standards for making public conveyances accessible.

Another problem with the ATBCB relates to the statutory

language regarding its composition and terms of offices of its members. As established in Section 502, the Board is to consist of ten Federal agency heads (or their high-level designees), and eleven public, non-governmental members (including five handicapped individuals). The terms of office for the public members is set at three years. Unlike many other similar pieces of legislation establishing boards and commissions, Section 502 does not say that a member shall continue to serve until a successor has been selected and appointed. As a result, for much of its existence ATBCB has had unfilled vacancies in the public member positions. These vacancies have undercut the public member majority on the Board as contemplated in the language of the Act. The terms of office provisions of Section 502 should track other statutes and require members to continue to serve until successors have been appointed and are ready to serve on the Board.

I. EEOC Authority For Enforcement Under Section 501

As originally enacted, Section 501 of the Rehabilitation Act of 1973 required executive agencies to submit affirmative action program plans to the Civil Service Commission, and directed the Commission to review such plans to see if they provide sufficient assurances, procedures, and commitments to achieve employment opportunities for people with disabilities. Pursuant to Reorganization Plan No. 1 of 1978 (43 Federal Register 19807), all enforcement functions related to employment of handicapped individuals previously held by the Civil Service Commission were transferred to the Equal Employment Opportunity Commission

(EEOC). Pursuant to this transfer of authority, EEOC has issued regulations for the implementation of Section 501 (29 C.F.R. part 1613, subpart G) and has administered the affirmative action plan review process.

In 1984 amendments to the Rehabilitation Act, a technical amendment to Section 501 was made, apparently prompted by the fact that the statute still made reference to the defunct Civil Service Commission. Inadvertently, however, the reference was changed to the Office of Personnel Management, which was the successor to many other Civil Service Commission functions, rather than to the EEOC. That there was no Congressional intent to transfer Section 501 enforcement functions away from EEOC is confirmed by the fact that Congress ratified the provisions of Reorganization Plan No. 1 of 1978 subsequent to the Section 501 amendment. Nonetheless, the erroneous amendment is confusing and should be corrected. Moreover, the mandate of Section 501 should be strengthened to require not merely the submission of an affirmative action plan but the submission and implementation of such a plan, and EEOC should explicitly be given the responsibility for establishing regulations outlining appropriate outreach and recruiting activities, in addition to nondiscrimination standards.

J. Application to Discrimination in Medical Treatment

One result of the controversy and legal actions surrounding the highly publicized instances of denials of medical treatment to certain handicapped newborns -- the so-called Baby Doe cases -- was the decision of a United States Circuit Court of Appeals

that Section 504 of the Rehabilitation Act of 1973 does not apply to medical treatment decisions. In the case of United States v. University Hosp., State U. of New York (729 F.2d 144 (2d Cir. 1984)) (commonly referred to as the "Baby Jane Doe" or "Stony Brook" case), the Court of Appeals for the Second Circuit ruled that there had traditionally been a "consistent congressional policy against the involvement of federal personnel in medical treatment issues" (Id. at p. 160). In light of this policy, the court held that it would not impute a Congressional intent that Section 504 apply to medical treatment issues in the absence of clearly expressed legislative intent to that effect. The court also expressed some difficulty with the question whether a handicapped child is a "handicapped individual" under Section 504, but ultimately determined that it "would defy common sense" to rule otherwise.

The court's ruling that Section 504 does not apply to discrimination in medical treatment removes the protection of the statute from a very important area. The U.S. Commission on Civil Rights has found that people with disabilities "face discrimination in the availability and delivery of medical services," citing examples of medical experimentation on disabled people, electroshock treatments, administration of psychotropic drugs, psychosurgery, inappropriate organ transplants, and denials of routine medical care, in addition to denials of lifesaving medical treatment to newborns with disabilities (U.S. Commission on Civil Rights, 1983, at pp. 35-36).

The decision in the University Hospital case has been

appealed to the United States Supreme Court. Unless the matter is clarified by the high Court, the coverage of medical treatment by equal opportunity laws for disabled people should be reestablished in the statutory language.

K. Other Enforcement Problems With Section 504

In addition to problems already mentioned in regard to the implementation of Section 504 of the Rehabilitation Act of 1973, there have been numerous delays in the regulatory enforcement process under Section 504. Regulations have been very slow in coming forth from agencies with Section 504 responsibilities. In 1980, a Federal court lawsuit, Williams v. United States (No. 80-5368 (C.D. Cal., filed Dec. 3, 1980)) was filed to address the failure of Federal agencies to promulgate regulations regarding their programs and activities.

There have also been criticisms of a Department of Justice Prototype Regulation issued to provide guidance to agencies in preparing their regulations, and of the proposed regulations issued by some agencies, particularly in regard to limitations upon agency obligations under the regulations.

Most of the substantive problems with the Prototype and agencies' proposed regulations result from a lack of specificity and standards in the statute, as discussed previously. A statutory clarification of the nondiscrimination requirement, along with timelines for the issuance of implementing regulations, would go a long way toward resolution of implementation problems under Section 504.

IV. PROBLEMS IN TRYING TO APPLY TRADITIONAL CIVIL RIGHTS LEGAL STANDARDS TO DISCRIMINATION ON THE BASIS OF HANDICAP

Statutes prohibiting discrimination on the basis of handicap have been considered "part of the general corpus of discrimination law" (New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979)), and analysts, courts, and regulators have looked to interpretations of traditional civil rights laws when analyzing and applying equal opportunity laws for people with disabilities. It has become apparent, however, that there are limits to the applicability of principles developed in these other areas to the problems of discrimination against people with disabilities. The U.S. Commission on Civil Rights has cautioned that legal approaches developed in race, sex, national origin, and religious discrimination cases cannot be applied uniformly and mechanically to cases of discrimination on the basis of handicap: "The legal theories, principles, and precedents of traditional civil rights law should be applied to handicap discrimination cases only when, and to the degree that, they are equally relevant." (U.S. Commission on Civil Rights, 1983, pp. 149, 163). The American Coalition of Citizens with Disabilities, in testimony endorsed by the American Council of the Blind, the Association for Retarded Citizens, the Association of Children with Learning Disabilities, the Disability Rights Center, the National Easter Seal Society, the Paralyzed Veterans of America, the National Network of Learning Disabled Adults, and the National Association of Private Residential Facilities for the Mentally Retarded, and submitted to the Subcommittee on

Employment Opportunities of the House Committee on Education and Labor on June 6, 1985, declared that "existing standards of nondiscrimination under Title VI of the Civil Rights Act of 1964 as applied to race, sex, religion and national origin are either inadequate or inappropriate to address discrimination on the basis of handicap..." A Federal court has observed that trying to fit the problem of handicap discrimination into the standards and remedies developed to deal with other types of discrimination is "akin to fitting a square peg into a round hole." (Garrity v. Gallen, 522 F.Supp. 171, 206 (D.N.H. 1981))

One major way in which standards of equal opportunity for persons with disabilities differ from those developed for other groups is the concept of reasonable accommodation. The individualized matching of persons with activities and making modifications to the activity to enable the individual to participate is integral to eliminating discrimination on the basis of handicap, but such matching and modification is rarely required in addressing other types of discrimination. The term "reasonable accommodation" does appear in Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e(j)) in regard to employers' obligation to accommodate the needs arising from religious practice. The Supreme Court has ruled, however, that this religious accommodation provision imposes only a de minimis requirement (Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977)), so it is not analagous to the matching and modification process that characterizes reasonable accommodation for persons with disabilities.

Similarly, other areas of nondiscrimination law have no

direct analog to the requirement of removing architectural, transportation, and communication barriers. Discrimination against people with disabilities has literally been built into the physical environment, and eliminating such discrimination requires planning and action to remove barriers that exclude disabled people. In the case of Alexander v. Choate (105 S.Ct. 712 (1985)), the U.S. Supreme Court recognized that removing architectural and transportation barriers is of pivotal importance in eliminating discrimination against people with disabilities (Id. at p. 719). In discussing the nondiscrimination requirements of the Rehabilitation Act of 1973, the Court stated that "elimination of architectural barriers was one of the central aims of the Act" (Id. at p. 719). Such environmental barriers resulting in the physical exclusion of a group of people are not a major feature of nondiscrimination standards under other types of laws.

Another difference between legal standards for addressing discrimination against people with disabilities and other types of discrimination relates to eligibility requirements, qualifications standards, and selection criteria. Under traditional civil rights standards, any such requirements, standards, and criteria that are based upon a person's race, sex, religion, or national origin (or that use some criteria as a subterfuge for race, sex, religion, or national origin) are generally illegal. In employment, the use of criteria of religion, sex, or national origin may be justified only by demonstrating that they are a bona fide occupational

qualification (BFOQ) "reasonably necessary to the normal operation of that particular business or enterprise..." (42 U.S.C. Section 2000e-2(e)). Courts have indicated that the BFOQ defense is to be very narrowly and stringently applied. There is no BFOQ defense for employment discrimination on the basis of race. In short, race, sex, national origin, and religion are almost never legitimate criteria for decisions about whether to allow a person to have a job or participate in a program or activity, because such characteristics have no direct connection with ability to perform or participate.

With disabilities, on the other hand, there is a much more complex relationship between a particular person's disability and performance ability. Some judgments based upon disability may be appropriate, while others may be discriminatory. A vision requirement for an air traffic controller position (with current technology) may be a necessary eligibility restriction, but the exclusion of blind people from employment as lawyers or insurance salespersons might constitute discrimination. A deaf person should be eligible to compete for a job as a construction worker or an accountant, but might appropriately be denied a position as a voice coach or a sound technician. The distinctions between these situations largely depend upon an analysis of the essential elements of a job, program, or activity, and a determination whether, with reasonable accommodation, the person can participate and perform the essential elements. Consequently, a more complex set of standards are required to deal with eligibility requirements, selection criteria, and qualifications standards in relation to

disabilities.

For these and other reasons, the standards for resolving problems of discrimination against persons with disabilities must differ from those addressing other types of discrimination. As the American Coalition of Citizens with Disabilities and eight other national disability organizations have stated:

> it is our conclusion that current Title VII standards are not adequate to effectively address and remedy discrimination on the basis of handicap. The necessity for expanding the scope of coverage of handicap discrimination laws to make them coextensive with the coverage of other civil rights laws should be pursued in a manner which guarantees that the legal standards to be applied will be tailored to provide clear and effective remedies to the types of discrimination faced by Americans with disabilities.
> (ACCD, 1985, at p. 8)

V. BILL OF RIGHTS FOR PERSONS WITH DISABILITIES

In some situations, particularly in the context of large residential institutions, disabled people have had to give up many of their rights and basic freedoms in order to obtain needed services, treatment, and benefits. Concerns that service providers and public agencies have sometimes run roughshod over the rights of their clients have prompted calls for bills of rights to proclaim and protect the rights of citizens with disabilities. In the Developmental Disabilities Assistance and Bill of Rights Act of 1975 (42 U.S.C. Section 6000 et seq.), Congress created such a bill of rights for developmentally disabled persons. Section 6010 of the Act is a Congressional finding that persons with developmental disabilities possess a list of rights; the rights enumerated include a right to appropriate treatment, services, and habilitation, to be provided in the least restrictive alternative, and a requirement that institutional and other residential programs meet certain minimum standards:

> (i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.
> (ii) Provision to such persons of appropriate and sufficient medical and dental services.
> (iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.
> (iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.
> (v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.
> (vi) Compliance with adequate fire and safety standards...

Section 6010 also requires compliance with regulations providing standards for intermediate care facilities for mentally retarded people, and, for facilities not covered by the ICFMR standards, it requires that appropriate care be provided, that only persons whose needs can be met by a facility be admitted to that facility, and that residential programs "provide humane care of the residents of the facilities, are sanitary, and protect their rights."

Despite the strong wording of the Section and the fact that Congress headed the Title of the Act in which Section 6010 is found "Establishment and Protection of the Rights of Persons with Developmental Disabilities," the Supreme Court determined that Congress did not intend to create enforceable rights and obligations. In Pennhurst State School and Hospital v. Halderman (451 U.S. 1 (1981)), the Court ruled that in enacting the Bill of Rights Congress was simply "encouraging" or giving a "nudge in the preferred direction," rather than mandating compliance with the rights enumerated. It held that Section 6010 "does no more than express a congressional preference for certain kinds of treatment" and is, thus, "too thin a reed to support the rights and obligations read into it." To date, Congress has taken no action to reestablish the enforceability of the rights declared in the Developmental Disabilities Bill of Rights.

In 1978, the Task Panel on Legal and Ethical Issues of the President's Commission on Mental Health submitted its report on Mental Health and Human Rights, in which it called for the establishment of Bills of Rights for all mentally handicapped

persons, both those institutionalized and those residing in the community (Task Panel Report, 20 Ariz. Law Review at pp.133-137). The Panel noted that approximately 14 states had established Bills of Rights for psychiatric patients and 12 had similar legislation for mentally retarded persons. It concluded that an adequate Bill of Rights should include at least seven basic components:

> (a) A statement that all mentally handicapped persons are entitled to the specified rights;
> (b) A statement that rights cannot be abridged solely because of a person's handicap or because s/he is being treated (whether voluntarily or involuntarily);
> (c) A declaration of the right to treatment, the right to refuse treatment and the regulation of treatment, the right to privacy and dignity, the right to a humane physical and psychological environment and the right to the least restrictive alternative setting for treatment;
> (d) A statement of other, enumerated fundamental rights which may not be abridged or limited;
> (e) A statement of other specified rights which may be altered or limited only under specific, limited circumstances;
> (f) An enforcement provision; and
> (g) A statement that handicapped persons retain the right to enforce their rights through habeas corpus and all other common law or statutory remedies.
> (Task Panel Report at p. 134)

Noting that existing state Bills of Rights are almost completely lacking in enforcement mechanisms, the Panel concluded that "(t)he statute should contain a strong enforcement provision" (Task Panel Report at p. 137).

A bill introduced in the 99th Congress (Senate Bill 974) would establish a Bill of Rights for mentally ill persons comparable to the Bill of Rights for developmentally disabled people. It contains no stronger enforceability language than the developmental disabilities version, and would presumably be unenforceable pursuant to the Court's reasoning in the Pennhurst

decision.

If such Bills of Rights are to be anything more than empty promises, they should be made binding and enforceable. And if an enforceable Bill of Rights is to be enacted, there do not appear to be any good reasons for not expanding it beyond developmental disabilities or mental disabilities to establish and protect the rights of all Americans with disabilities.

VI. INFORMATION ABOUT RIGHTS AND LEGAL REPRESENTATION

The Task Panel on Legal and Ethical Issues of the President's Commission on Mental Health aptly observed that "recognition of rights precedes enforcement" (Task Panel Report at p. 138). The laws guaranteeing equal opportunity for persons with disabilities recommended in this report will have little effect unless people with disabilities learn about such laws, their meaning, and how to go about enforcing them. To assure that persons with disabilities will have access to information about their substantive and procedural rights, it will be important for agencies charged with enforcing the laws and regulations to publicize their requirements, and to seek to inform disabled people and their families about these requirements and the rights of individuals who believe that such requirements have been violated. It will also be important to encourage independent living centers, consumer and parent organizations, and agencies providing advocacy services, to provide accurate information about the rights of people with disabilities under Federal laws, regulations, and court decisions, and about the avenues of potential remedies one may pursue to vindicate such rights when you believe they have been violated.

Frequently, asserting one's rights through the pursuit of legal and administrative remedies leads a person with a disability to need legal representation. For many Americans who are not wealthy, adequate legal representation is not easy to obtain, particularly in a specialized field such as that of

disability rights law. Access to competent legal representation may be an essential prerequisite for making legal guarantees of equal opportunity for people with disabilities a reality.

The Developmental Disabilities Assistance and Bill of Rights Act of 1975 required each state to establish "a system to protect and advocate the rights of persons with developmental disabilities" (42 U.S.C. Section 6012), The statute specifies further that these protection and advocacy systems (P&As) must "have the authority to pursue legal, administrative, and other appropriate remedies" to insure the protection of the rights of developmentally disabled persons. As to the importance of such advocacy efforts, a 1980 report of the General Accounting Office concluded that "the State Protection and Advocacy Program could be the most potent and effective mechanism to insure that the developmentally disabled receive the benefits, services, and rights they are entitled to." (GAO, 1980, p. 72) A report prepared by the Institute for Comprehensive Planning found that P&As had served some 44,000 developmentally disabled persons during their first two years of operation (Henney and Alldredge, 1980, p. 3), with only a small percentage of the cases necessitating legal action. The report indicated that only 1.5% of the cases handled by P&As during the two year period involved actual court proceedings, and another 5.5% required other types of formal proceedings such as administrative hearings and due process hearings. (Id. at p. 12)

A bill currently pending in Congress (Senate Bill 974) would create a similar protection and advocacy system for mentally ill persons. Such advocacy services should be made available for all

citizens with disabilities, whatever their category of disablity and regardless of the age of onset of their disabling condition.

Another important determinant of the ability of people to obtain appropriate legal redress for denials of their rights is the availability of awards of attorneys fees. Court awards of reasonable attorneys fees to successful complainants are authorized under most other types of nondiscrimination laws. Currently, attorneys fees are available under Sections 504 and 505 of the Rehabilitation Act of 1973. They are not, however, available under the Education for All Handicapped Children Act (Public Law 94-142), pursuant to the decision of the United States Supreme Court in the case of Smith v. Robinson (104 S.Ct. 334 (1984)). Bills have been introduced in Congress to undo the impact of Smith v. Robinson and authorize the award of reasonable attorneys fees when parents prevail in special education cases.

As under most other types of nondiscrimination statutes, equal opportunity laws for people with disabilities should provide for reasonable attorneys fees to be awarded when complainants successfully prove that they have been the victims of unlawful discrimination.

VII. TECHNICAL ASSISTANCE AND AID TO SMALL BUSINESSES

In many ways Big Business has already endorsed the concept of equal opportunities for people with disabilities and has begun efforts to pursue this goal. David T. Kearns, the President of Xerox Corporation, has been a leading spokesperson for "full participation" for citizens with disabilities, arguing that business has an economic stake in helping individuals with disabilities become employed and in taking advantage of the talent pool they represent (Gatty, p. 3). E.I. du Pont de Nemours and Company has made a point of recruiting disabled employees and has monitored their numbers and progress in the company. Du Pont has achieved a reputation as an exemplary employer of people with disabilities, and the company's reports are replete with examples of successful case stories (Du Pont, 1981, pp. 10-16). In addition to Xerox and Du Pont, other major companies making similar efforts to promote the employment of persons with disabilities include AT&T; the Prudential Insurance Company; Sears, Roebuck and Company; Levi Strauss and Company; IBM; and Control Data Corporation, to name but a few (Gatty, pp. 30-35). Recently, Levi Strauss and McDonald's were among the companies whose national television advertising campaigns have featured people with disabilities in a natural, positive context.

Companies with government contracts have had some dozen years experience with the requirement that they "take affirmative action to employ and advance in employment qualified handicapped persons" as mandated in Section 503 of the Rehabilitation Act of

1973. Likewise, universities and other major Federal grant recipients have been subject to the Section 504 nondiscrimination requirement since 1973. To these agencies, equal opportunities for people with disabilities is not a new idea.

Small businesses are likely to have less familiarity with concepts of nondiscrimination on the basis of handicap, barrier removal, and reasonable accommodation, and may have concerns about the feasability of making modifications in their facilities and operations to provide equal opportunities for individuals with disabilities. Data suggests that most such concerns are misplaced; studies of Federal contractors subject to Section 503 indicate that accommodations are usually minor and inexpensive (Ellner and Bender, 1980, pp 51-52; Berkeley Planning Associates, 1982, pp. 20-29; U.S. Commission on Civil Rights, 1983, pp. 106-107). A 1982 United States Department of Labor study of accommodations provided for disabled workers by Federal contractors showed that only 22 percent of such workers received some form of accommodation, and these were generally inexpensive -- half of the accommodations cost nothing and more than two-thirds cost less than $100 (Berkeley Planning Associates, 1982, pp. 20-29). Only about 9 percent involved modifying office equipment, such as telephones or typewriters, or providing dictaphones, audiovisual aids, or other special devices.

Small businesses need to have access to information about the most practical and efficient ways to modify their facilities and practices to permit the participation of disabled persons. They also need to be apprised of information about such programs as the Targeted Jobs Tax Credit and the tax deduction

for barrier removal expenses that may help to defray some of the financial impact of necessary modifications. In short, small businesses should be provided with information and technical assistance concerning their responsibilities to provide equal opportunities for people with disabilities in the most practical and efficient manner possible. One program that has begun to address such needs is the Job Accommodations Network. As the scope of equal opportunity laws for people with disabilities is expanded, more such efforts are needed.

Additional programs are also needed to provide funding and incentives for the costs of modifications and barrier removal. These might consist of a direct funding or grant program, a loan fund, guaranteed loans, or tax incentives. Novel sources of funds for such programs might include fines assessed against discriminators or direct transfers of funds saved by Federal agencies when a disabled person gets a job (similar fund transfers for rehabilitation costs are currently made by the Social Security Disability Trust Fund).

Tax incentives might expand upon the current tax deduction for expenses of barrier removal, build upon the Targeted Jobs Tax Credit program, or provide a new program of deductions or tax credits for costs incurred to allow persons with disabilities to be hired or obtain goods and services from small businesses.

VIII. RECOMMENDATIONS

For all the reasons set out in this report, the National Council on the Handicapped makes the following recommendations:

1. Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap.

Such a statute should be packaged as a single comprehensive bill, perhaps under such a title as "The Americans with Disabilities Act of 1986." The recommendations which follow spell out more specifically the components which such a bill should contain in order to create a comprehensive and effective equal opportunity law for individuals with disabilities.

2. The law should prohibit discrimination on the basis of handicap by:

   a. The Federal Government, all of its agencies and departments, and the United States Postal Service.

   b. All recipients of Federal financial assistance, with coverage of all operations of the recipient and not just a particular program or activity.

   c. Federal contractors and subcontractors and Federal licensees.

   d. All employers engaged in an industry affecting commerce who have fifteen or more employees; employment agencies; and labor unions.

   e. All sellers, landlords, and other providers of housing covered by Title VIII of the Civil Rights Act of 1968.

   f. All public accommodations covered by Title II of the Civil Rights Act of 1964.

   g. All persons, companies, and agencies that engage in the business of interstate transportation of persons, goods, documents, or data.

h. All persons, companies, and agencies that make use of the mails or interstate communications and telecommunications services for the business of selling, arranging, or providing insurance.

i. The States, counties, and local governments, pursuant to Congressional authority to enact legislation that abrogates the States' immunity under the Eleventh Amendment in order to enforce the Fourteenth Amendment guarantee of Equal Protection of the Laws.

These provisions would expand coverage of equal opportunity law for people with disabilities to make it commensurate with the coverage of other types of nondiscrimination laws. In addition, they would undo limitations imposed upon the coverage of such laws as a result of such Supreme Court decisions as Atascadero State Hospital v. Scanlon, Grove City College v. Bell, and Community Television of So. Cal. v. Gottfried. In response to the Scanlon ruling, the coverage of State, county, and local governments (including such entities as local zoning boards) would be spelled out, pursuant to the authority of Congress to abrogate the States' immunity under the Eleventh Amendment in order to enforce the Fourteenth Amendment. In contrast to the Grove City decision, all operations of Federal financial aid recipients would be prohibited from discriminating. And in response to the Gottfried holding, Federal licensees would explicitly be covered. The recommended provisions would also close certain other gaps in the coverage of such statutes by explicitly covering interstate transportation and discriminatory insurance practices.

3. The law should provide a clear definition and standards for applying the prohibition of discrimination on the basis of handicap.

The statute should straightforwardly prohibit "discrimination on the basis of handicap," without establishing any eligibility classification for the coverage of the statute. Discrimination on the basis of handicap should be broadly construed to apply the requirements of the statute to all situations in which a person is subjected to unfair or unnecessary exclusion or disadvantage because of some mental or physical impairment, perceived impairment, or history of impairment. Discrimination should be defined to include: a) Intentional exclusion; b) Unintentional exclusion; c) Segregation; d) Unequal or inferior services, benefits, or activities; e) Less effective services, benefits, or activities; and f) The use of screening criteria with a disparate impact upon individuals with disabilities that do not correlate with actual ability. The nondiscrimination requirement should expressly include a duty to make reasonable accommodations, which should be defined as providing or modifying devices, services, or facilities, or changing practices or procedures in order to allow a particular person to participate in a particular program, activity, or job. The duty not to discriminate should also include an obligation to remove architectural, transportation, and communication barriers, including meeting the accessibility requirements recommended below. In addition, there should be a requirement of eliminating discriminatory qualifications standards, selection criteria, and eligibility requirements, with a delineation of the standards and legal tests to be used to

determine when such qualifications, criteria, and requirements constitute discrimination. In addition, a requirement of outreach and recruitment efforts should be explicitly established; the focus of such efforts should be upon people with serious disabilities, such as the Equal Employment Opportunity Commission's current listing of "targeted disabilities."

4. <u>The law should delineate specific enforcement standards, procedures, and timelines for the implementation of equal opportunity requirements.</u>

The agencies responsible for developing regulations implementing the equal opportunity law for people with disabilities should be clearly designated, and timelines established for the issuance, after public comment, of such regulations. The Architectural and Transportation Barriers Compliance Board should be directed to establish binding minimum guidelines for architectural, transportation, and communication accessibility, as discussed below in Recommendation 5. Consistent with such minimum guidelines, the Department of Housing and Urban Development should be directed to develop appropriate regulations concerning housing opportunities (for further discussion, see the Council's report on Housing), the Department of Transportation should be directed to develop regulations for mass transit, air travel, and other modes of transportation covered by the law (for further discussion, see the Council's report on Transportation), the Federal Communications Commission should be directed to promulgate regulations governing its licensees, and other agencies should be directed to develop regulations for the areas of their

responsiblity, including the programs and activities they conduct, those they license, and those for which they provide financial assistance. The Equal Employment Opportunity Commission should expressly be charged with the development of regulations governing Federal government employment and for setting standards for all other employment covered by the law. An administrative enforcement process should be provided for individuals who believe that their rights under the law and regulations have been violated. Successful complainants should be entitled to injunctive relief, monetary damages, and back pay as necessary to remedy the discrimination to which they have been subjected. A private right of action in Federal court should be established for complainants if administrative enforcement has not occurred after a specified amount of time (e.g., 60 or 90 days), and at the completion of the administrative decision-making and appeals process. The law should authorize the imposition of fines or the cutoff of Federal funds (including both grants and contracts) if there is a showing of discrimination in an appropriate administrative or judicial proceeding; such fines or funding cutoff should continue until the discrimination is corrected or discontinued.

5. <u>The Architectural and Transportation Barriers Compliance Board should be given the authority and responsibility to issue minimum guidelines for universal accessibility and other standards for the removal of architectural, transportation, and communication barriers in facilities, vehicles, programs, and activities covered by the equal opportunity law for people with disabilities.</u>

This recomendation is intended to correct the problems with the language of Section 502 of the Rehabilitation Act of 1973 as

currently worded that have left questions about the extent of ATBCB's authority to set minimum guidelines regarding transportation and communication barriers. It would also expand the Board's authority commensurate with the expanded coverage of the equal opportunity law recommended in this report. Provisions establishing ATBCB should also be amended to provide that public members of the Board shall continue to serve at the expiration of their terms, until their successors have been appointed and are ready to serve.

6. The law should direct the Federal Government to use its leverage as a consumer of goods and services to set standards and timelines for requiring that businesses and companies from which it purchases or rents goods, services, or facilities shall make such goods, services, and facilities accessible, available to, and usable by people with disabilities on a nondiscriminatory basis.

This requirement and standards implementing it should apply to such matters as the rental of conference and meeting rooms; the rental of hotel rooms for government employees and meeting attendees; airline and train tickets, and contracts with airlines and train companies; and rental and leased cars and contracts with rental car and leasing companies. The standards to be imposed in regard to accessibility and usability of facilities and vehicles should be developed by the Architectural and Transportation Barriers Compliance Board, and requirements regarding consumer products and services should be developed and administered by the General Services Administration, in consultation with the ATBCB and the National Council on the Handicapped.

7. Equal opportunity obligations upon Federal contractors and subcontractors should be made enforceable by a private right of action.

This recommendation highlights a change that is implicit in Recommendation 4. It would correct the current situation in which responsibilities of Federal contractors and subcontractors under Section 503 of the Rehabilitation Act of 1973 are sometimes difficult to enforce administratively and are generally held to be unenforceable in the courts.

8. The law should apply to discrimination in medical services.

This provision is necessary to correct the narrowing of coverage resulting from the Court of Appeals decision in United States v. University Hosp., State U. of New York, which ruled that Section 504 of the Rehabilitation Act of 1973 does not cover discrimination in the area of medical treatment.

9. An enforceable Bill of Rights for Persons with Disabilities should be enacted.

Because American guarantees of basic rights of all persons in the U.S. Bill of Rights and other constitutional and statutory provisions have not always been equally recognized and implemented in regard to citizens with disabilities, an explicit delineation of important rights of persons with disabilities is necessary to prevent abuses and reestablish those rights. Such a Bill of Rights should be patterned upon the provisions of the existing Developmental Disabilities Bill of Rights and that proposed by the Task Panel on Legal and Ethical Issues of the President's

Commission on Mental Health. It should, however, apply to persons with all types of disabilities, and should explicitly be made enforceable administratively and in the Federal courts.

10. To assure the recognition and implementation of the rights established in this equal opportunity law, Congress should authorize an expanded Protection and Advocacy System in each State to protect and advocate for the rights of individuals with all types of disabilities, regardless of the age of onset; Congress should authorize the awarding of reasonable attorneys fees and litigation expenses to prevailing complainants.

Federal agencies charged with implementing the requirements of the equal opportunity law for persons with disabilities should provide notices and public education efforts to make persons with disabilities and their families, and persons and agencies subject to the nondiscrimination requirement aware of rights and responsibilities under Federal laws, regulations, and court decisions, and of potential remedies and compliance procedures when a violation is alleged. Independent living centers, consumer and parent organizations, service providers, information and referral services, and advocacy agencies should also be encouraged to make such information available. Congress should support additional advocacy services to implement the law by expanding the function of existing developmental disabilities Protection and Advocacy Systems to authorize them to serve persons with all types of physical and mental disabilities and by providing seed money for legal representation to Independent Living Centers and other agencies (perhaps with funds obtained from fines paid by violators of the equal opportunity law). The allowance of reasonable attorneys fees would track other types of nondiscrimination laws that provide for court awards of

reasonable attorneys fees to complainants who successfully prove that they have been the victims of illegal discrimination.

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